

1 DOMINICA C. ANDERSON (SBN 2988)
2 RYAN A. LOOSVELT (SBN 8550)
3 **DUANE MORRIS LLP**
4 100 N. City Parkway, Suite 1560
5 Las Vegas, NV 89106
6 Telephone: 702.868.2600
7 Facsimile: 702.385.6862
8 Email: dcanderson@duanemorris.com
9 rloosvelt@duanemorris.com

10 Attorneys for CedarCrestone, Inc.

11

12 **UNITED STATES DISTRICT COURT**

13

14 **DISTRICT OF NEVADA**

15 ORACLE USA, INC., a Colorado corporation,
16 ORACLE AMERICA, INC., a Delaware
17 corporation; and ORACLE INTERNATIONAL
18 CORPORATION, a California corporation,

19 Plaintiffs,
20 v.

21 RIMINI STREET, INC., a Nevada corporation;
22 and SETH RAVIN, an individual,

23 Defendants.

24 AND ALL RELATED COUNTER CLAIMS.

25 Case No. 2:10-CV-0106-LRH-PAL

26 **NON-PARTY CEDARCRESTONE,
27 INC.'S OPPOSITION TO PLAINTIFFS'
28 OBJECTION TO ORDER OF
DISCOVERY MAGISTRATE DENYING
MOTION TO MODIFY PROTECTIVE
ORDER**

29 COMES NOW, non-party CedarCrestone, Inc. ("CedarCrestone"), by and through its
30 attorneys, Duane Morris LLP, and hereby submits its Opposition to Plaintiffs Oracle USA, Inc.'s.
31 Oracle America, Inc.'s, and Oracle International Corporation's (collectively as "Oracle") Objection
32 to Order of Discovery Magistrate Denying Motion to Modify Protective Order [Dkt. No. 369], as
33 follows:

34 **I. INTRODUCTION**

35 In the course of discovery in this action, Oracle served a highly objectionable subpoena on
36 one of its non-party Platinum Partners, CedarCrestone. Oracle represented to CedarCrestone that it
37 needed the materials identified by the subpoena in order to prosecute its case against the defendants
38 in this action, Rimini Street and Seth Ravin. Oracle also repeatedly assured CedarCrestone that
information provided by CedarCrestone in response to the subpoena would be protected by the

provisions of the agreed-upon Protective Order in this action, which prohibits the use of discovery material provided by non-party subpoena recipients outside of this action. Oracle even entered into a separate stipulation with CedarCrestone in which it agreed that the Protective Order would govern CedarCrestone's production. Relying on Oracle's repeated assurances that it would comply with the Protective Order, CedarCrestone forewent asking the Court to intervene to quash or modify Oracle's objectionable subpoena and produced over 2.16 GB of documents and software (the "Discovery Materials"), much of which constituted proprietary trade secrets, and a company representative for a deposition.

Having received the benefit of its bargain with CedarCrestone, Oracle filed a Motion to Modify the Protective Order in an effort to avoid its burdens and use CedarCrestone's Discovery Materials against it. The Magistrate Judge (Leen, J.) denied Oracle's Motion. [Order, Dkt. No. 364]. At issue in the instant motion for reconsideration is whether her decision to deny Oracle's Motion to Modify was "clearly erroneous" and "contrary to law."

The Magistrate Judge's decision was neither "contrary to law" nor "clearly erroneous." Oracle greatly mischaracterizes the Magistrate Judge's ruling in order to manufacture error where none otherwise exists. Contrary to what Oracle argues, the Magistrate Judge did not "find" pending collateral litigation to be a prerequisite to modification. Rather, the Magistrate Judge properly based her ruling on an evaluation of the considerations enumerated by the Ninth Circuit when deciding whether to modify a protective order, including whether CedarCrestone's reliance interests in the protective order outweighed the policy of avoiding duplicative discovery. The Magistrate Judge also did not "find" there was currently good cause to modify the protective order or that Oracle's requested discovery was relevant to present collateral litigation against CedarCrestone.

After full briefing and oral argument, the Magistrate Judge denied Oracle's Motion to Modify on the grounds that (1) there is "no pending collateral litigation," (2) Oracle failed to provide a "description of a specific intent to have a specific form of collateral litigation," (3) there was "nothing to avoid repetitious or duplicative discovery that wastes either of the parties' resources," and because (4) Oracle improperly sought to lift the protection "on a wholesale basis" with respect to everything CedarCrestone produced. [Transcript, Dkt. No. 370-1, 20:17-25]. The Magistrate Judge

1 therefore concluded that "for these reasons the motion for protective order is denied." [Dkt. No.
 2 370-1, 21:4-5].

3 The Magistrate Judge's reliance on the absence of pending collateral litigation, Oracle's
 4 failure to provide an adequate description of its contemplated collateral litigation, and Oracle's
 5 attempt to modify the protective order wholesale as grounds to deny Oracle's Motion to Modify was
 6 neither erroneous nor contrary to law but rather entirely consistent with Ninth Circuit precedent.
 7 Accordingly, this Court should affirm the Magistrate Judge's decision and overrule Oracle's
 8 Objection.

9 **II. STATEMENT OF FACTS**

10 Oracle negotiated and agreed with the Defendants in this action to a stipulated protective
 11 order to facilitate discovery that specifically prevents use of the discovery outside the instant
 12 litigation. [Protective Order, Dkt. No. 55]. Oracle later subpoenaed information from several non-
 13 parties, including CedarCrestone, which is one of Oracle's Platinum Partners. (CedarCrestone's
 14 Opposition to Motion to Modify Protective Order, Dkt. No. 329, Section II(C), Exh. 2). Oracle's
 15 subpoena to CedarCrestone was void and objectionable on many grounds. (*Id.*). In addition to being
 16 partners, Oracle and CedarCrestone are also competitors, and therefore the use of CedarCrestone's
 17 confidential information by Oracle outside the Rimini action poses significant harm to
 18 CedarCrestone's business interests. (*Id.*, Sections II(A), II(D)).

19 Instead of quashing the subpoena and/or filing other challenges,¹ CedarCrestone worked in
 20 good faith with Oracle to produce information for this action. (*Id.*). CedarCrestone ultimately
 21 produced over 600 pages of documents, a disk with approximately 2.16 GB of information, and
 22 voluntarily provided a witness for deposition without any challenges. (*Id.*).² CedarCrestone elected

23 ¹ Among other extreme deficiencies with the Subpoena, it was *void* for being issued and served in
 24 the wrong jurisdiction and otherwise highly objectionable. [Dkt. No. 329, CedarCrestone's
 25 Opposition to Motion to Modify Protective Order, Section II(C), n.1-void subpoena]; [Dkt. No.
 26 331-3, Exh. 5 – 18 page letter of detailed objections to Subpoena]. The Subpoena was objectionable
 27 as incredibly overbroad, unreasonably burdensome, requested irrelevant information as well as trade
 secrets, sensitive commercial information not remotely pertinent to the Rimini action yet harmful to
 CedarCrestone's business interests, and called for information that would cause CedarCrestone to
 violate contracts and licenses with other parties. (*Id.*).

28 ² After the deposition of CedarCrestone's witness, Oracle belatedly sent CedarCrestone the
 deposition transcript and Oracle had already marked the entire transcript as Highly Confidential, so

1 not to press its objections against Oracle and respond in full to the Subpoena in direct reliance on
 2 *repeated* representations by Oracle that CedarCrestone's discovery would only be used consistent
 3 with the protective order already in place, and not for any purposes outside this Rimini action. (*Id.*).
 4 Indeed, Oracle even entered into a separate stipulation with CedarCrestone in which it agreed that
 5 the Protective Order would govern CedarCrestone's Discovery Materials.

6 Oracle has now sought to modify the Protective Order so that it can use CedarCrestone's
 7 information against it. (*Id.*, Section II(D)). After full briefing and oral argument, the Magistrate
 8 Judge denied Oracle's Motion to Modify Protective Order by Minute Order. [Dkt. No. 364]. In
 9 denying Oracle's Motion, the Magistrate Judge stated that: (1) there was "no pending collateral
 10 litigation," (2) there was "nothing to avoid repetitious or duplicative discovery that wastes either of
 11 the parties' resources," (3) there was "no description of a specific intent to have a specific form of
 12 collateral litigation," and (4) that Oracle sought to lift protections "on a wholesale basis" as to all
 13 discovery provided by CedarCrestone without delineation. [Transcript, Dkt. No. 370-1, 20:17-21:3].

14 **III. ARGUMENT**

15 **A. Standard For Reconsideration Of Magistrate's Order By District Court Judge.**

16 A district judge may reconsider a non-dispositive matter referred to a magistrate judge but
 17 may only modify the magistrate's ruling where it is shown to be "clearly erroneous or contrary to
 18 law." LR IB 3-1; Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). The reviewing court may not
 19 simply substitute its judgment for that of the deciding court. *United States v. BNS, Inc.*, 858 F.2d
 20 456, 464 (9th Cir. 1988). A non-dispositive order entered by a magistrate must be deferred to unless
 21 it is "clearly erroneous or contrary to law." *Grimes v. City & County of San Francisco*, 951 F.2d
 22 236, 241 (9th Cir. 1991).

23 **B. In the Ninth Circuit, a Court Deciding Whether To Modify A Protective Order
 24 Must Weigh the Reliance Interest Of The Party Opposing Modification Against
 25 The Policy Of Avoiding Duplicative Discovery in Pending Collateral Litigation.**

26 The Ninth Circuit recognizes that "a court should not grant a collateral litigant's request for

27 CedarCrestone agreed to the designations. [Dkt. No. 329, CedarCrestone's Opposition to Motion to
 28 Modify Protective Order, Section II(C)]. Oracle now appears to suggest that its own designations
 warrant modification of the protective order.

1 modification automatically.” *Foltz v. State Farm Mutt’s Auto. Ins. Co.*, 331 F.3d 1122, 1132 (9th Cir.
 2 2003). Instead, the collateral litigant must demonstrate the relevance³ of the protected discovery to
 3 the collateral proceedings.” *Foltz*, 331 F.3d at 1132. Relevance to the collateral litigation is not the
 4 sole consideration evaluated by the court. Once the required showing of relevance is made, the
 5 court, before deciding to modify the protective order, must weigh “the countervailing reliance
 6 interest of the party opposing modification *against the policy of avoiding duplicative discovery.*”
 7 *Foltz*, 331 F.3d at 1133, *citing Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475 (9th Cir.
 8 1992) (emphasis added). As set forth *infra*, the Magistrate Judge properly applied this test in
 9 denying Oracle’s Motion to Modify the Protective Order in this case.

10 Not surprisingly, Oracle intentionally leaves this latter part of the weighing test – avoiding
 11 duplicative discovery – out of its Objection pleading altogether. But it is the avoidance of
 12 duplicative discovery that is key here, and without collateral litigation, the risk of duplicative
 13 discovery is unquestionably diminished.

14 **C. The Magistrate Judge Properly Considered the Absence Of Pending Collateral
 15 Litigation, Among Other Factors, In Weighing CedarCrestone’s Reliance
 16 Interest in the Protective Order Against The Policy Of Avoiding Duplicative
 17 Discovery.**

18 In denying Oracle’s Motion to Modify, the Magistrate Judge properly recognized that,
 19 *absence* of pending collateral litigation is an important element in the weighing process of whether
 20 duplicative discovery may be avoided. Indeed, while the Ninth Circuit generally favors access to
 21 discovery materials, it typically does so “to meet the needs of parties *engaged* in collateral
 22 litigation.” *Foltz*, 331 F.3d at 1131 (emphasis added); *Beckman*, 966 F.2d at 475 (Ninth Circuit
 23 precedent “favors disclosure to meet the needs of parties *in pending litigation.*”) (emphasis added).
 24 And while courts may allow the fruits of one litigation to facilitate other cases, it does so where it
 25 “advances the interests of judicial economy *by avoiding the wasteful duplication of discovery.*”
 26 *Foltz*, 331 F.3d at 1131 (emphasis added).

27 ³ While Oracle argues that the Magistrate Judge “found” the subject discovery relevant to the
 28 anticipated collateral proceedings, she actually held that Oracle did not sufficiently specify or
 describe the contemplated collateral litigation, and thus the Judge could not have necessarily made
 such a relevancy determination.

At least one Ninth Circuit court has recognized that the absence of pending collateral litigation weighs in favor of denying a motion to modify a protective order. In *Avago Technologies Fiber IP (Singapore) PTE, Ltd. v. IPtronics, Inc.*, 2011 WL 5975243 (N.D. Cal. 2011), the Court denied modification of a motion to modify a protective order in which Avago sought to lift the protections in order to file a separate collateral lawsuit against the same defendant, IPtronics. Avago argued that discovery produced pursuant to a protective order revealed certain wrongdoing by IPtronics, and asked the court to modify the protective order to in part permit use of the discovery to bring a potential collateral proceeding. *Avago Technologies*, 2011 WL 5975243 at *1. Avago principally relied on the *CBS Interactive Inc. v. Etilize*, 257 F.R.D. 195 (N.D. Cal. 2009) case, on which Oracle likewise principally relies, and argued that use of the information should be permitted outside of the case in which it was produced to bring a collateral lawsuit. *Id.*

The Court denied the motion to modify and held, “in contrast to *CBS Interactive*, Avago has not identified with any particularity the specific documents it seeks to disclose.” *Id.* The Court also held that Avago did not “identify[] the specific Avago individuals to whom disclosure was sought.” *Id.* Most importantly, the Court further held that “there are no collateral proceedings pending ... and Avago has not even provided any specific information regarding the collateral proceedings it contemplates.” *Id.*

As in *Avago Technologies*, in denying Oracle’s Motion, the Magistrate Judge in this case held that there was not a significant risk of duplicative discovery which outweighed CedarCrestone’s reliance interests in part because there is no currently pending litigation. (Transcript, Dkt. No. 370-1, 20:17-25, 21:1-3). The Magistrate Judge also stated that, not only was there no pending litigation, but Oracle did not even provide a “description of a specific intent to have a specific form of collateral litigation” by Oracle. (Transcript, Dkt. No. 370-1, 20:17-25) (emphasis added). An adequate description of contemplated litigation is particularly important in the absence of collateral litigation. Consistent with Ninth Circuit precedent, the failure to provide one is sufficient grounds for denying modification of a protective order where there is no pending collateral litigation. See *Avago Technologies*, 2011 WL 5975243, at *1. Oracle cannot undo this failure in a motion for reconsideration.

1 Further, the Magistrate Judge held that Oracle was attempting to modify the protective order
 2 on a wholesale basis without particularity with respect to the specific documents for which it sought
 3 to lift the protections. (Transcript, Dkt. No. 370-1, 20:17-25). While Oracle now attempts to argue
 4 that it specifically identified the discovery for which it sought to lift protection, the Magistrate Judge
 5 correctly held that Oracle's Motion to Modify Protective Order never delineated what specific
 6 information from this wholesale production it needed to support its unfiled, unspecified
 7 "anticipated" lawsuit against CedarCrestone. Instead, Oracle summarily sought to lift the protective
 8 order's protections wholesale.

9 Oracle also claims that its Motion to Modify specifically described the lawsuit it would bring
 10 but a review thereof proves otherwise. Oracle's Motion to Modify merely alleges that the evidence
 11 obtained from CedarCrestone "is relevant to any litigation brought by Oracle ... against
 12 CedarCrestone." [Dkt. No. 272, 22-24]. As the Magistrate Judge stated, there was no description
 13 regarding intended collateral litigation.

14 Oracle's Objection now attempts to identify specific portions of documents or testimony *for*
 15 *the first time*, and attempts to introduce purported facts *it never discussed in its Motion*. However,
 16 none of that is pertinent to the Court's reconsideration and it should all be disregarded; Oracle still
 17 concedes in the end that it seeks to lift the protections wholesale for all of CedarCrestone's
 18 production and testimony.

19 Similarly, Oracle's Objection contains many sweeping, self-serving allegations of
 20 wrongdoing against CedarCrestone that are completely false, unproven, and unsupported, in an
 21 attempt to sway the Court upon reconsideration. As the Magistrate Judge recognized at the hearing,
 22 Oracle is merely "accusing" CedarCrestone of wrongdoing, but there certainly has been no such
 23 showing. Oracle's allegations of wrongdoing, which CedarCrestone vigorously disputes, are not
 24 determinative or relevant to the issues before this Court on reconsideration.

25 The Magistrate Judge utilized the *Foltz* weighing test and determined that, under the
 26 circumstances of this case, denial of modification was warranted. (Transcript, Dkt. No. 370-1, 21-
 27 45). Her decision to deny Oracle's Motion to Modify, which was based in part on the absence of
 28 pending collateral litigation, is consistent with Ninth Circuit law.

1 **D. The Magistrate Judge's Ruling Is Consistent With Ninth Circuit Authority.**

2 Oracle relies on two *inapposite* California federal district court cases (*CBS Interactive* and
 3 *Oracle Corp. v. SAP AG*, 2010 WL 545842 (N.D. Cal. Feb. 12, 2010) in an attempt to argue that the
 4 Magistrate Judge's ruling in this case somehow creates an inter-Circuit conflict. Unlike the instant
 5 case, however, *CBS Interactive* involved a party litigant seeking to modify a protective order to
 6 bring another suit against the other party litigant. Because the *CBS Interactive* defendant was
 7 already involved in litigation with the party seeking modification of the protective order, it could not
 8 show that its reliance interest outweighed the Court's policy of avoiding duplicative discovery. *SAP*
 9 is distinguishable along similar lines. As Oracle itself points out in its Objection, it sought
 10 modification of the protective order in that case in order to use discovery provided by the *defendants*
 11 *in that case* in order evaluate the viability of commencing collateral litigation against *those same*
 12 *defendants* in Europe.

13 By contrast, in this case, the Magistrate Judge found that the lack of pending collateral
 14 litigation between Oracle and CedarCrestone meant that there was little to no risk of duplicative
 15 discovery which would warrant modifying the protective order. CedarCrestone also demonstrated
 16 that it had a substantial reliance interest in the Protective Order that was distinguishable from that of
 17 the parties opposing modification in *CBS Interactive*, *SAP*, *Foltz* and *Beckman*. Indeed, in *Foltz* and
 18 *Beckman*, the party opposing modification showed no reliance outside of the fact that it produced
 19 documents pursuant to a stipulated protective order. In *CBS Interactive* and *SAP*, the parties
 20 opposing modification already were named defendants in lawsuits brought by the party seeking
 21 modification when they produced the discovery materials at issue.

22 As fully briefed in CedarCrestone's Opposition to motion to Modify Protective Order,
 23 CedarCrestone is not a party to litigation with Oracle, produced a large volume of its proprietary
 24 trade secrets and forewent objections and challenges to Oracle's overbroad, highly objectionable and
 25 void subpoena, all in direct reliance on Oracle's *repeated* assurances that the discovery would only
 26 be used for purposes of the Rimini Action and a separate stipulation in which Oracle agreed that the
 27 Protective Order would govern CedarCrestone's production. (CedarCrestone Opposition to Motion
 28 to Modify, Dkt. No. 329, Section II(C), 6:16-9:15). CedarCrestone and Oracle negotiated a

1 production, and CedarCrestone provided a witness for deposition without challenges all in direct
 2 reliance on Oracle's *many* representations and assurances, only to have Oracle renege on those
 3 representations once it obtained the discovery it wanted from CedarCrestone. (*Id.*).

4 "The extent to which a party can rely on a protective order depends on the extent to which
 5 the order did reasonably induce the party to allow discovery." *Foltz*, 331 F.3d at 1137, *citing*
 6 *Beckman*, 966 F.2d at 475. Reliance is greater where discovery is provided or witnesses testified
 7 without invoking their rights. *Beckman*, 966 F.2d at 475. Among the goals furthered by protective
 8 orders is reducing conflict over discovery and facilitating the flow of information through discovery
 9 ... changing the ground rules later is to be avoided because protective orders that cannot be relied
 10 upon will not foster cooperation through discovery." *Foltz*, 331 F.3d at 1137, *citing* Wright, Miller
 11 & Marcus §2044.1.

12 Oracle has failed to demonstrate that the Magistrate Judge's ruling is "clear erroneous or
 13 contrary to law." A Magistrate Judge has broad discretion in ruling on discovery issues and
 14 determining whether to modify a protective order.⁴ The Magistrate Judge in this case properly
 15 considered whether collateral litigation is pending between Oracle and CedarCrestone when
 16 weighing CedarCrestone's reliance interest in the protective order against the policy of avoiding
 17 duplicative discovery. Her ruling was not contrary to law and did not create an intra-Circuit conflict.
 18 Instead, Magistrate Leen's ruling is consistent with Ninth Circuit precedent, such as *Avago*
 19 *Technologies*, which denied modification based on the same considerations Magistrate Leen denied
 20 modification here.

21 **IV. CONCLUSION**

22 For the foregoing reasons and argument, CedarCrestone respectfully requests that this Court
 23 deny Oracle's Objection to Order of Discovery Magistrate Denying Motion to Modify Protective
 24 Order. The Magistrate Judge's Order is not clearly erroneous or contrary to law and must therefore
 25 be affirmed.

26 ///

27 ⁴ To the extent this Court, if at all, is inclined to overturn Magistrate Leen's ruling, CedarCrestone
 28 respectfully requests the Court stay enforcement of such order for thirty (30) days to allow time for
 an appeal.

1 DATED: August 8, 2012

2
3
4 DUANE MORRIS LLP

5 By: /s/ Dominica C. Anderson
6 Dominica C. Anderson (SBN 2988)
7 Ryan A. Loosvelt (SBN 8550)

8
9
10 Attorneys for CedarCrestone, Inc.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2012, I served via CM/ECF a true and correct copy of the foregoing **NON-PARTY CEDARCRESTONE, INC.'S OPPOSITION TO PLAINTIFFS' OBJECTIONS TO ORDER OF DISCOVERY MAGISTRATE DENYING MOTION TO MODIFY PROTECTIVE ORDER** to all parties and counsel as identified on the CM/ECF-generated Notice of Electronic Filing.

/s/ *Jana Dailey*

Jana Dailey

An employee of DUANE MORRIS LLP